U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 16-0309 BLA

WILBUR GREENE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	
	)	
and	)	
	)	
CONSOL ENERGY, INCORPORATED	)	DATE ISSUED: 03/28/2017
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Colleen A. Geraghty, Administrative Law Judge, United States Department of Labor.

Austin P. Vowels (Vowels Law PLC), Henderson, Kentucky, for claimant.

William S. Mattingly (Jackson Kelly PLLC), Lexington, Kentucky, for employer/carrier.

Helen H. Cox (Nicholas C. Geale, Acting Solicitor of Labor; Maia Fisher, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (2013-BLA-05726) of Administrative Law Judge Colleen A. Geraghty awarding benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a subsequent claim filed on April 16, 2012.[1]

Applying Section 411(c)(4), 30 U.S.C. §921(c)(4) (2012),[2] the administrative law judge credited claimant with at least twenty-two years of underground coal mine employment,[3] and found that the new evidence established that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that claimant invoked the Section 411(c)(4) presumption.[4] The administrative law judge also found that employer did not rebut the Section 411(c)(4) presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that employer did not rebut the Section 411(c)(4) presumption. Claimant and the Director, Office of Workers' Compensation Programs, respond in support of the administrative law

[1] Claimant filed three previous claims, which were all finally denied. Director's Exhibits 1-3. Claimant's most recent prior claim was filed on January 22, 2007, and was denied by the district director on February 4, 2008, because claimant did not establish any element of entitlement. Director's Exhibit 3.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where claimant establishes fifteen or more years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. § 921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[3] The record reflects that claimant's last coal mine employment was in Kentucky. Director's Exhibits 6, 10. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[4] Because the new evidence established a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), the administrative law judge found that claimant established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c).

judge's award of benefits.[5]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Rebuttal of the Section 411(c)(4) Presumption

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to rebut the presumption by establishing that claimant has neither legal nor clinical pneumoconiosis,[6] 20 C.F.R. §718.305(d)(1)(i), or by establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii). The administrative law judge found that employer failed to establish rebuttal by either method.

After finding that employer disproved the existence of clinical pneumoconiosis, the administrative law judge addressed whether employer also disproved the existence of legal pneumoconiosis. The administrative law judge considered the medical opinions of Drs. Tuteur and Selby, who opined that claimant suffers from chronic obstructive pulmonary disease (COPD) due solely to smoking. Employer's Exhibits 1, 4, 8, 10.

The administrative law judge discredited their opinions because she found they failed to adequately explain how they eliminated claimant's twenty-two years of coal mine dust exposure as a contributor to his disabling COPD. Decision and Order at 19. The administrative law judge also discredited Dr. Tuteur's opinion regarding the cause of claimant's COPD as based upon generalities. *Id.* The administrative law judge therefore found that employer failed to disprove the existence of legal pneumoconiosis.

[5] Employer does not challenge the administrative law judge's finding that claimant invoked the rebuttable presumption that he is totally disabled due to pneumoconiosis pursuant to Section 411(c)(4). This finding is, therefore, affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[6] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

Employer argues that the administrative law judge failed to provide a proper basis for discrediting the opinions of Drs. Tuteur and Selby. We disagree. The administrative law judge permissibly questioned the opinions of Drs. Tuteur and Selby because she found that the physicians failed to adequately explain how they eliminated claimant's twenty-two years of coal mine dust exposure as a source of his disabling obstructive pulmonary impairment. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313-14, 25 BLR 2-115, 2-128 (4th Cir. 2012); *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668, 25 BLR 2-725, 2-740 (6th Cir. 2015); Decision and Order at 20. The administrative law judge also permissibly discredited Dr. Tuteur's opinion on the cause of claimant's COPD because the doctor improperly applied generalizations without addressing claimant's specific condition.[7] *See Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985); Decision and Order at 19-20.

Because the administrative law judge permissibly discredited the only opinions finding that claimant does not suffer from legal pneumoconiosis,[8] we affirm her finding that employer failed to establish that claimant does not have the disease .[9] Accordingly, we affirm the administrative law judge's determination that employer failed to rebut the

[7] In excluding coal mine dust as a contributing factor in claimant's disabling chronic obstructive pulmonary disease (COPD), Dr. Tuteur cited to medical studies and statistics indicating that while smokers who have never worked in the coal mines have a twenty percent chance of developing COPD from smoking, while nonsmoking miners have only a one to two percent chance of developing COPD from coal mine dust exposure. Employer's Exhibit 8 at 7.

[8] Employer argues that the administrative law judge erred in not addressing medical evidence from the prior claim. Employer, however, has not explained how medical evidence from the prior claim, which predates claimant's invocation of the rebuttable presumption of total disability due to pneumoconiosis, is relevant to whether employer has rebutted the presumption. *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624, 11 BLR 2-147, 2-149 (6th Cir. 1988) (holding that it is illogical to find rebuttal established based on evidence that predates the evidence on which invocation is based); *Coffey v. Director, OWCP*, 5 BLR 1-404, 1-407 (1982). Thus, under the facts of this case, we find no error in the administrative law judge's decision not to discuss the prior claim evidence at rebuttal.

[9] Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that the miner does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

Section 411(c)(4) presumption by establishing that claimant does not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i).[10]

Employer also argues that the administrative law judge erred in finding that employer failed to establish rebuttal by showing that no part of claimant's respiratory or pulmonary disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii). We disagree. The administrative law judge rationally discounted the opinions of Drs. Tuteur and Selby that claimant's pulmonary impairment was not caused by pneumoconiosis because the physicians did not diagnose legal pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove the existence of the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05, 25 BLR 2-713, 2-721 (4th Cir. 2015); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-452 (6th Cir. 2013); *Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); Decision and Order at 21-22. We therefore affirm the administrative law judge's determination that employer failed to establish that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(ii).

Because claimant invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis, and employer did not rebut the presumption, the administrative law judge's award of benefits is affirmed.

[10] Because the administrative law judge provided valid reasons for discrediting the opinions of Drs. Tuteur and Selby, the administrative law judge's error, if any, in discrediting their opinions for other reasons, constitutes harmless error. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). Therefore, we need not address employer's remaining arguments regarding the weight accorded to the opinions of Drs. Tuteur and Selby.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge